

WCA Rule Advisory Committee - 5/22/08 Meeting

Draft Actions Eligible for Credit Section

8420.0541 ACTIONS ELIGIBLE FOR CREDIT.

Note: The proposed changes below include the elimination of Public Value Credit and a conversion to a single credit system. Many of the changes below are also proposed at least partially to provide more consistency between the WCA Rule and the Wetland Mitigation Memorandum of Understanding (MOU) signed by BWSR and the USACE on May 20, 2007.

Subpart 1. **Scope.** The actions in this part are eligible for replacement credit ~~or wetland banking credit~~ as determined by the local government unit in parts [8420.0500](#) to [8420.0760](#). ~~All actions eligible for credit require the incorporation of buffer areas meeting the minimum requirements as described in subpart 2 of this part.~~

~~— (2) the water quality treatment system design includes pretreatment of urban runoff before prior to discharge to the replacement wetland areas receiving credit; is required, and~~
~~— (5) the wetland replacement area receiving credit must be is separated from the water quality treatment system that pretreats runoff before prior to discharge to the wetland area receiving credit.~~ Treatment of runoff in this part means any part of a stormwater treatment system needed to comply with water quality treatment requirements of state or local stormwater permits or ordinances. This includes requirements for managing hydraulic bounce as indicated in guidance document [8420.0112](#) subpart N. ~~The actions eligible for credit in subparts 3 through 10 are placed in general order of preference for replacement.~~

“Or wetland banking credit” is proposed for removal as it is redundant. The second sentence of this subpart proposes to require a minimum buffer around all replacement wetlands (see additional discussion under the new subpart 2 below). Previous items A2 and A5 are proposed to be relocated to this section from subpart 10 (water quality treatment areas) as they apply to all replacement wetlands.

The new language uses the word “treatment” rather than “pretreatment” to reduce confusion, and is intended to clarify the concept of “treatment” of stormwater. The proposed language was developed with the concurrence of the Minnesota Pollution Control Agency and utilizes a document titled, “Storm-Water and Wetlands: Planning and Evaluation Guidelines for Addressing Potential Impacts of Urban Storm-Water and Snow-Melt Runoff on Wetlands, Minnesota Storm-Water Advisory Group, 1997.” This document is currently incorporated by reference under [8420.0112](#). This language could possibly be relocated to the definitions section and clarifying that it applies to all wetlands, existing and replacement.

The last sentence places a general order of preference on replacement actions. Comments are requested.

Subp. 62. Upland b Buffer areas. ~~Buffer areas of permanent native and noninvasive dominated vegetative cover established or preserved on upland adjacent and contiguous to replacement wetlands may receive credit, provided that the upland buffer must have an average width of at least 50 feet for wetlands in nonmunicipal areas and an average width of at least 25 feet for wetlands in a municipal area and the buffer vegetative establishment or preservation plan must be approved by the technical evaluation panel. Replacement credit for the buffer may not exceed 100 percent of the replacement wetland area and may only be used as public value credits for replacement above a 1:1 ratio.~~ Buffer areas established or preserved on upland are required around replacement wetlands at a minimum average width of 50 feet in non-municipal areas and a minimum average width of 25 feet in municipal areas. This requirement may be

varied by the local government unit when it is found to be not practicable or feasible based on a review by the technical evaluation panel. Buffer areas may include existing wetland when upland is not available adjacent to the replacement wetland. Replacement credit may be granted for up to 10% of the buffer area if the vegetation is non-native and up to 25% of the buffer area for native, non-invasive vegetation. The area of buffer for which replacement credit is granted will be no more than four times the area of the replacement wetland. Replacement credit may be allowed for upland buffers around existing high valued wetlands at the replacement site only if the minimum widths are maintained and the maximum buffer area is not exceeded. The local government unit may increase the maximum buffer area allowed for credit if:

- A. the buffer extends upstream in the watershed and will protect and increase wetland function;
- B. the buffer protects valuable upland plant communities or habitats that could otherwise be lost or degraded; or
- C. the buffer provides a greenway corridor or habitat connection with another highly functioning wetland.

“Upland buffer” was changed to “Buffer” to allow for credit of wetland buffer areas where wetlands rather than uplands surround a restored wetland and their protection would add to the value of the project. This change would also allow for compliance with the mandatory buffer requirement where wetlands at least partly surround the wetland mitigation project.

The currently proposed credit allocation (10-25 percent) is consistent with the Corps, and a cap on the amount of buffer allowed for credit is provided to prevent overuse. However, the issue has been raised as to whether it is enough credit to encourage additional buffer. The Technical Committee has recommended increasing the amount of credit allowed, up to 50% for native non-invasive, and lowering the cap to twice the size of the replacement wetland to maintain the same wetland to buffer credit-ratio.

Items A, B, and C attempt to provide flexibility for the LGU to increase the maximum area allowed in instances when it would have a significant public value benefit, and it is consistent with a watershed-based approach to mitigation.

Subp. ~~23~~. **Restoration of completely drained or filled wetland areas.** Restoration of both the natural hydrology regime and native, noninvasive vegetation on wetlands that have been completely drained or filled ~~wetlands~~ may receive new wetland replacement credit in an amount not up to exceed 100 percent of the ~~total~~ wetland area hydrologically and vegetatively restored. The vegetation management plan should set a goal of emulating the historical native vegetation typical of the wetland plant community being restored.

Subp. ~~34~~. **Restoration-Rehabilitation of partially drained or filled wetland areas.** Restoration of both the natural hydrology regime and native, noninvasive vegetation of jurisdictional wetlands that have been degraded by prior drainage, filling, or through a diversion of the natural watershed, or filling may receive credit in accordance with the following:

A. in a less than 80 percent area, receive public value credit in an amount up to 50 percent of the degraded wetland area or receive new wetland credit in an amount not to exceed 25 percent of the total wetland area hydrologically restored, provided that permanent native, noninvasive vegetation is established within the restored wetland area and on an upland buffer, which may receive replacement credit according to subpart 6; and any hydrologically degraded wetland area that was planted with annually seeded crops, was in a crop rotation, seeded to pasture grasses or legumes, or was required to be set aside to receive price supports or equivalent payments in at least fifteen of the last 20 years prior to the date of application may receive credit of up to 90% of the wetland area restored;

B. in a greater than 80 percent area, receive new wetland credit in an amount not to exceed 25 percent of the total wetland area hydrologically restored. any hydrologically degraded

wetland area that was planted with annually seeded crops, was in a crop rotation, seeded to pasture grasses or legumes, or was required to be set aside to receive price supports or equivalent payments in at least ten of the last 20 years prior to the date of application may receive credit of up to 75% of the wetland area restored; and

C. all other partially drained wetland areas may receive wetland credit of up to 50 percent of the wetland area restored.

This change is to make this item more consistent with other actions eligible for credit and accommodate the proposed conversion to a single credit system. It also allows additional credit for partially drained farmed wetlands, recognizing the additional level of degradation of farmed wetlands.

In this rule draft, the credit amount allowed for a farmed and partially drained wetland is the same as that for a farmed wetland without partial drainage (if farmed 15 out of 20). Input on the proper replacement amounts and relationships between the different actions eligible for credit is requested.

Another option is to grant up to 90% credit based on a functional analysis that demonstrates significant increases in wetland functions in the rehabilitated wetland.

~~Subp. 4. Exceptional natural resource value projects.~~ This subpart was relocated to subpart 6 of the Actions Eligible Credit section. See edits and commentary there.

Subp. 5. **~~Restoration Vegetative rehabilitation~~** of farmed wetlands. Reestablishment of permanent native, noninvasive vegetative cover on a farmed wetland areas that ~~was~~ have not been affected by prior drainage or filling may receive replacement credit for:

A. up to 50% of the area restored for wetland areas that ~~were~~ planted with annually seeded crops, ~~was were~~ in a crop rotation seeded to pasture grasses or legumes, or ~~was were~~ required to be set aside to receive price supports or equivalent payments in ~~six at least ten~~ of the last 20 years prior to the date of application for a replacement ~~plan~~ or bank plan ~~may receive credit in accordance with one of the following considerations; or~~

A. if the wetland was annually seeded, in rotation, or set aside for six or more of the last 20 years, the wetland is eligible for public value credit not to exceed 50% of the wetland area; or

B. if the wetland was annually seeded, in rotation, or set aside for ten or more of the last 20 years, the wetland is eligible for new wetland credit based on the percent of time the wetland area was annually seeded, in rotation, or set aside during the prior 20-year period. up to 75% of the area restored for wetland areas that were planted with annually seeded crops, were in a crop rotation seeded to pasture grasses or legumes, or were required to be set aside to receive price supports or equivalent payments in at least 15 of the last 20 years prior to the date of application for a replacement or bank plan.

C. up to 100% of the area restored for wetland areas in bank service areas 2, 3, and 4 based on the percent of time the wetland areas were planted with annually seeded crops, were in a crop rotation seeded to pasture grasses or legumes, or were required to be set aside to receive price supports or equivalent payments prior to the date of application for a replacement or bank plan.

The changes above are intended to clarify the original intent of this subpart to apply only to farmed wetlands that have not been partially drained. Partially drained wetlands (regardless of farmed status) should use that subpart for credit allocation. The changes are consistent with the proposed conversion to a single credit system and attempt to simplify the applicability of this subpart by specifying applicable credit ratios rather than a sliding scale. The changes also create a higher standard in terms of cropping history than item A while allowing for a greater amount of credit. Credit allowed under item B is proposed to be capped at 75%.

Item C was added at the recommendation of the Technical Committee for the following reasons: Much of the original intent of this provision was to allow credit for restoration of flat, farmed wetlands in the northwest. These farmed wetlands are functionally very different than farmed wetlands in other parts of the state with greater variations in topography (i.e. temporarily flooded basins). In addition, regular tillage of the flat wetlands in these areas often has a greater impact on early season hydrology due to increased evaporation. Farming of these flat wetland areas also can have greater impacts to water quality due to increased wind erosion and runoff than farmed basins. Thus, additional credit should be allowed to account for the additional degree of degradedness.

The Technical Committee also recommended to consider maintaining a “sliding scale” for all credit allocations under this part, even if capped at a lower percentage. Comments are requested.

~~Subp. 6. Upland buffer areas.~~ This subpart is proposed for relocation to Subpart 2. See edits and commentary there.

Subp. ~~4-6~~. **Exceptional natural resource value projects.** Projects that restore exceptional natural resource values of wetlands may receive ~~either public value or new wetland~~ replacement credit ~~solely or in combination~~ as determined by the local government unit with concurrence of the technical evaluation panel. The amount ~~and type~~ of credit allowed shall be based on a functional assessment that documents the restoration of these values. The word exceptional in this subpart means replacement projects that restore functions listed under 8420.0548 Special Considerations.

The BWSR Rule Team presented the following three options for ENRV to the Technical Committee:

- 1) Leave as-is, with detail provided in guidance.*
- 2) Incorporate existing guidance, or some modified version of it, into rule.*
- 3) “Eliminate it” as it currently exists, but use the concept of ENRV to augment credit allocated for other actions when restoring an exceptional resource.*

The Technical Committee recommended some combination of options one and two. BWSR staff are currently in the process of developing language to correspond to that recommendation. That notwithstanding, general comments on the above three options are requested.

Subp. 7. Protection of ~~W~~wetlands previously restored via conservation easements. Wetland areas previously restored for conservation purposes under terminated or expired conservation easements, agreements, or contracts are eligible for up to 75 percent ~~new wetland replacement~~ credit based on the appropriate credit allocation from subparts 3, 4, or 5 applied prior to program enrollment, and adjacent upland buffer areas reestablished to permanent native, noninvasive vegetative cover are eligible for public value credit above a 1:1 ratio in an amount not to exceed 25 percent of the restored wetland area. The wetland areas eligible for credit are limited to those areas where the easement, contract or agreement granted the landowner the right to drain the restored wetlands upon termination.

This change is to reflect the proposed elimination of public value credit. Credit would be allocated based on site conditions prior to enrollment in the program consistent with the other applicable subparts of this section.

~~—Subp. 8. Restoration of wetland vegetation. Reestablishment and maintenance of permanent native, noninvasive vegetation cover on a wetland that is dominated by invasive or exotic species may receive public value credit. Replacement credit may not exceed 25 percent of~~

~~the total wetland area vegetatively restored and the vegetative restoration and maintenance plan must be approved by the technical evaluation panel. The technical evaluation panel may require a monitoring period in excess of 12 months after the vegetative restoration is completed before approving the site for replacement credit.~~

This subpart is proposed to be eliminated for several reasons, including:

- 1) The provision is currently not often utilized in most of the state due to the relatively low amount of credit allowed.***
- 2) In most instances, the requirements are extremely difficult to achieve.***
- 3) The timeframe is unclear and has been interpreted anywhere from 5 years to perpetual. It is likely 5 years, but in either case, it is difficult to track and enforce.***
- 4) The provision allows for replacement of permanent impacts with temporary management activities, which can lead to a long-term loss of public value.***
- 5) Public Value Credit is proposed to be eliminated.***
- 6) Restoration of permanent wetland vegetation for replacement credit will still be allowed in instances when the site is severely degraded and lacking vegetation (restoration of farmed wetlands) and as part of a restoration of rare or extremely valuable wetland resources (exceptional natural resource value projects), making this subpart unnecessary.***

~~— Subp. 9. Wetlands established via mineral extraction site reclamation. Wetland areas established in nonwetland areas due to mineral extraction activities may receive new wetland credits if all of the following criteria are met:~~

~~— A. application for replacement credit is made within ten years after the last day that extraction activities have taken place;~~

~~— B. a wetland establishment and management plan has been approved by the technical evaluation panel and implemented by the landowner or authorized agent;~~

~~— C. the wetland area meets the criteria in part 8420.0550; and~~

~~— D. if the land is not state-owned, a conservation easement in favor of the state has been accepted by the state and recorded in the county recorder's office, or if the land is state-owned, covenants and restrictions are recorded that identify that the wetland area is a replacement wetland subject to this chapter.~~

Subpart 9 is proposed to be moved to the Wetland Creation subpart as it is a form of creation. See that subpart for revisions. Items B, C, and D are proposed for removal as they are redundant and therefore unnecessary.

~~— Subp. 10. Water quality treatment areas.~~

~~— A. New wetland credit of up to 100 percent for wetland areas constructed as part of water quality treatment systems may be granted by the local government unit with the concurrence of the technical evaluation panel, provided that:~~

~~— (1) the local government unit has an approved and active stormwater management plan;~~

~~— (2) the water quality treatment system design includes pretreatment of runoff before discharge to the wetland area receiving credit;~~

~~— (3) the wetland area receiving credit is constructed in nonwetland areas;~~

~~— (4) the water quality treatment system is associated with an ongoing or proposed project that will impact a wetland or public waters;~~

~~— (5) the wetland area receiving credit is separated from the water quality treatment system that pretreats runoff before discharge to the wetland area receiving credit;~~

~~— (6) the wetland area receiving credit is designed for a maximum 24-inch rise in water level for the ten-year critical storm event;~~

~~— (7) the standards in part 8420.0550 are followed; and~~

~~— (8) the wetland area receiving credit is a functioning wetland.~~

~~— B. Stormwater detention basins allowed for replacement are not eligible for the exemptions in part 8420.0122 and are subject to parts 8420.0500 to 8420.0630.~~

Item A, A3, A6, A8, and B are proposed to be incorporated into the Wetland Creations subpart and edited there.

Item A1 of this subpart is proposed to be eliminated. The purpose of this requirement was to ensure proper maintenance of single cell or other systems providing primary treatment. Recent legislative changes eliminated the single cell option so the requirement of A1 is no longer necessary.

Similarly, item A4 was previously necessary to prevent widescale banking of PVC generated from primary stormwater treatment ponds unrelated to any wetland impact. Recent legislative changes that require the treatment systems to be functioning wetlands in order to receive credit make this requirement unnecessary.

Items A2 and A5 of this subpart are proposed to be relocated to the Scope of this section. See edits and commentary there. Item A7 is proposed for removal because it already applies to all replacement wetlands and is redundant and unnecessary here.

Subp. ~~11~~ 8. **Wetland creations.** ~~All other wWetlands~~ **Wetlands** ~~created sites in nonwetland areas~~ may receive ~~new wetland replacement~~ credit in an amount ~~not to exceed 100 up to 75~~ percent of the total wetland area created. ~~Except for public projects, a performance bond or other surety shall be secured and held until the local government unit has determined that the design goal for the wetland replacement site, as approved in the replacement plan, is fully achieved.~~

Subp. 9. **Wetlands established via mineral extraction site reclamation.** Wetland areas established in nonwetland areas due to mineral extraction activities may receive new wetland replacement credits if all of the following criteria are met:

A. application for replacement credit is made within ten years after the last day that extraction activities have taken place;

Wetlands created due to mineral extraction activities may receive replacement credit in accordance with this subpart only for those areas actively mined within 10 years prior to the application for credit.

Subp. 10. **Water quality treatment areas.**

A. New wetland credit of up to 100 percent for wWetland areas constructed as part of water quality treatment systems may be granted receive replacement credit in accordance with this subpart only if by the local government unit with the concurrence of the technical evaluation panel, provided that:

(3) the wetland area receiving credit is constructed in nonwetland areas;

(6) the wetland area receiving credit is a functioning wetland designed for a maximum 24-inch rise in water level for the ten-year critical storm event;

(8) the wetland area receiving credit is a functioning wetland.

B. Stormwater detention basins Any portions of water quality treatment systems allowed for replacement are not eligible for the exemptions in part [8420.0122](#) and are subject to parts [8420.0500](#) to [8420.0630](#).

Select items from previous subparts 9 and 10 (“Wetlands established via mineral extraction site reclamation” and “Water quality treatment areas”) are proposed to be incorporated into this subpart to simplify the rule, as they are wetland creations. In addition, current statutory requirements for “Water quality treatment areas” are effectively the same for any created wetland, so it makes sense to include the provision in creation.

The revised language regarding mineral extraction sites clarifies confusion regarding areas eligible for credit and was relocated here because it refers to a type of creation.

Previous subpart 10, item A3 is incorporated into the first sentence of the new language for this subpart and applies to all wetland creations. Item B is restated and remains in this current draft, but could possibly be removed if covered elsewhere.

Subp. 9. **Water quality and wildlife habitat enhancement.** In greater than 80% pre settlement wetland areas, replacement credit may be granted for water quality enhancement and wildlife habitat improvement projects in upland areas immediately adjacent to high value wetlands that improve wetland functions. Examples of actions eligible under this part include upland buffers of wetland areas in headwaters of designated trout streams, wetlands and upland buffers in shoreland protection areas, and practices protecting wetlands within approved total maximum daily load implementation plan areas. Credit is not allowed under this subpart for treatment of new or unauthorized stormwater inputs or actions taken to comply with other requirements. Credit must be based on the following criteria:

A. Credit will be limited to a maximum of 12.5 percent of a buffer area directly adjacent to a high priority area that is restored to permanent, native, noninvasive vegetation.

B. Wetland functions must be increased in at least 25% of the wetland functions measured by a functional assessment method approved by the board.

C. Credit areas must be protected by a permanent easement granted to the board.

This is a new subpart that would add an additional option for credit in the greater than 80% pre-settlement wetland areas, where there are limited options for credit. Credit would be tied to an increase in wetland function by restoring wetland areas and/or immediately adjacent buffer areas. It also aligns with the interests of other agencies who prefer replacement in the same region as the impacts to prevent the export of wetland function outside of the region.

Subp. 10. **Wetland preservation.** In greater than 80% pre settlement wetland areas, wetland credit may be granted for up to 12.5% of wetland areas preserved under a perpetual conservation easement. Wetland areas to be preserved must be under a demonstrable threat and provide regionally important functions based on a functional analysis or local plan. Wetland preservation for replacement credit can only occur after considering replacement as provided under subparts 1 through 8. Demonstrable threat in this part would include a determination by the local government unit that there is a threat of degradation or impact to wetland areas. In determining the existence of a demonstrable threat and eligibility for replacement credit under this subpart, the local government unit must consider, at a minimum:

A. the local and regional value of the wetland to be preserved;

B. the ability to replace the functions and values of the wetland if impacted;

C. the ability to prevent future degradation of the preserved wetland's functions;

D. the ability of existing regulations to protect the wetland;

E. the land ownership and zoning classification of the wetland and adjacent areas;

F. the probability or likelihood that the wetland will be degraded or impacted; and

G. for northern white cedar swamps, the harvest of mature trees without assurance of regeneration.

This is a new subpart that would add an additional option for credit in the greater than 80% pre-settlement wetland areas where there are limited options for credit, and provide a mechanism to preserve high valued wetlands and reduce the net loss of wetland quality and biodiversity. This part would not be allowed in less than 80% presettlement wetland areas to comply with M.S. 103G.222 (i) which states "Except in a greater than 80 percent area, only wetlands that have been restored from previously drained or filled wetlands,may be used in a statewide banking program..." This subpart would also be consistent with currently proposed legislation which would specifically allow preservation in >80% areas.

Subp. 11. **Wetland Credit Conversion.** After (DATE), applications for wetland replacement plans, banking plans, and to deposit wetland credits must determine wetland credit according to subparts 2 to 10. Public value credit that has been deposited in the state wetland bank prior to (DATE) must comply with provisions A to C, as follows:

A. existing account holders in the state wetland bank may convert all of their public value credits that had been deposited prior to (DATE) as provided for in subparts 2 to 10;

B. existing account holders in the state wetland bank can withdraw their public value credits and new wetland credits according to part 8420.0541 in effect at the time of deposit or according to part 8420.0541 in effect at the time of the withdrawal; or

C. public value credit that has not been converted or withdrawn from the state wetland bank will be converted to wetland credit as provided for in subparts 2 to 10 on January 1, 2012.

This language is suggested to allow a timeframe for wetland bank account holders to either sell or convert public value credit that has been allowed previously.

Concern has been raised concerning item B, which would allow a choice between the old rule and the new rule (after its adoption) for utilization of credits, as this would in effect allow applicants and willing bank holders to choose which version of the rule to follow. Additionally, subparts 2-10 of the current draft rule do not provide a clear method for conversion of all existing bank credits.

Nonetheless, the language is included here for comment and discussion as other options will need to be explored for credit conversion.

Another option would be to require conversion at the time of adoption of the new rule, but to allow for a “generous” conversion factor.